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Competition litigation in the EU and the United Kingdom after the 2014 Antitrust damages directive: balancing the demands of a sound administration of justice with the need for more effective private competition enforcement through fair and effective evidence disclosure

1. Introduction

The question of how to facilitate the private enforcement of the competition rules has been a much vexed issue for the EU institutions as well as for the Member States. At Union level, these discussions, which have been ongoing since the early 1990s, have eventually culminated in the enactment in 2014 of a Directive aimed at laying down common rules governing competition damages actions. The Directive lays out common rules in a number of areas, ranging from standing to limitation periods, to the interaction between adjudication and the out-of-court resolution of these disputes. One of its central objectives is to correct the information asymmetry often existing between litigants and affecting the ability of the "weaker" one (usually the plaintiff) to secure the evidence that is both relevant and necessary to prove his or her case. To achieve this goal the Directive provides for the minimum harmonisation of the rules governing the discovery of evidence that is held by either another litigant or by a third party: in addition, to ensure that the exercise of these rights does not unduly interfere with the effectiveness of public enforcement, it contains special rules in respect of requesting access of documents held by National Competition Authorities (NCAs). Nonetheless, the circumstance that this harmonisation is only "minimal" raises issues as to how the Directive's rules are destined to "impact" on the existing domestic rules and more generally to interact with the EU principle of national autonomy.

This paper considers the extent to which the 2014 Directive aims to pursue the *prima facie* concurring objectives of on the one hand making civil competition litigation a "realistic" option for all plaintiffs and on the other hand safeguarding the role of the national competition authorities (NCAs) in the detection and sanction of new infringements against the background of established EU principles as well as of the domestic rules in force in individual member states. Starting from an examination of its rationale, the paper will discuss the approach adopted by the Directive in respect of the disclosure of evidence in civil proceeding as a means of correcting the imbalance between plaintiffs and defendants as regards the availability of relevant documentary proof. Thereafter, the rules governing specifically the disclosure of documents gathered by competition agencies as a result of a leniency application will be discussed. It will be argued that on the one hand, it may be acceptable to restrict the scope of the principle of 'equality of arms', which is fundamental for the fairness of domestic litigation throughout the Union, to ensure the effective detection of anti-competitive behaviour. On the other hand, it will be submitted that the approach adopted by the Directive may not be easy to reconcile with the principle of national autonomy and in particular with its tenet of effectiveness, as interpreted by the EU Court of Justice in recent decisions.

It will be concluded that the 2014 Directive should on the whole be welcomed as a concrete effort toward greater access to justice in an area of complex litigation, especially for claimants; nonetheless, it is also clear that whether this measure is going to be successful will depend on the outcome, in the national laws of each Member State, of its implementation, due to the differing rules governing many of the issues that the Directive tackles and, consequently, of the underlying tension between the commitment to achieving a common purpose and the continuing relevance of the principle of national autonomy.

2. Access to justice in private competition enforcement cases in the EU between convergence and national autonomy—a complex story

2.1. Collective actions and private competition enforcement—from “hard harmonisation” attempts to the choice of “moral suasion” ... and from the particular to the general!

The limited remit of this contribution does not allow for the in-depth examination of the debate on how to facilitate the bringing of private claims on the part of victims of competition infringements for the purpose of seeking redress of the loss suffered as a result. It is now accepted that having the right to seek compensation for the loss caused by anti-competitive practices, recognised by the Court of Justice of the EU (CJEU) in the *Crehan* and *Manfredi* decisions, is central to the efficient and coherent application of the Treaty competition rules.¹ The recognition of this cause of action contributed to the adoption, in 2003, of the Modernisation Regulation (Council Regulation No 1/2003), which as part of its plans for the decentralisation of the enforcement of Articles 101 and 102 TFEU in toto, confirmed the relationship of complementarity between civil litigation and public enforcement as well as the restoration of harm rationale underscoring the damages' remedy.²

As is well-known, however, the 2003 Regulation did not bring about any harmonisation of the rules governing the procedures before the NCAs³ or indeed the civil proceedings lodged before national courts and in which the EU competition rules were invoked: in respect to the latter, Regulation No 1/2003 only laid out mechanisms of “soft cooperation” between the domestic courts and the EU Commission. Accordingly the lack of common rules governing court proceedings concerning the application of Articles 101 and 102 TFEU has meant that, in accordance with the principle of national autonomy, different rules would apply.⁴ Consequently, the EU Commission called for the introduction of a common core of rules destined to create a “level-playing field” for potential claimants in competition cases.⁵ Its 2008 White Paper advocated for, among other proposals, the introduction of rules on the standing of direct and indirect purchasers, of mechanisms for the “aggregation” of low-value claims into the same civil action and of a common “minimum level of disclosure inter partes of relevant evidence, subject to judicial scrutiny, to correct the “information asymmetry” problem.⁶ It also envisaged conferring binding legal force as to the proof of the existence to NCAs decisions, along the lines of the position of Commission's infringement findings⁷ and doing away with any requirement for the claimant to prove fault on the part of the defendant.⁸ However,

¹ -453/99, *Courage v Crehan*, [2001] ECR I-6297, para. 25-26, 31-32; see also C-295/04, *Manfredi ed altri v Lloyd Adriatico ed altri*, [2006] ECR I1421, para. 61, 64-65, 92-95.

² See e.g. White Paper on Modernisation (99/027) April 1999, available at: http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf, (hereinafter referred to as White Paper), pp. 16-17; see also p. 40; see also Green Paper on damages actions for the breach of the EC antitrust rules, (2005) COM0672, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005DC0672&from=EN> (hereinafter referred to as Green Paper), para. 1.2-1.3, 2.7.

³ See Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU, [2003] OJ L1/1 (hereinafter referred to as Regulation No 1/2003), Preamble, Recital 16; see also Articles 11-12 and, for the domestic courts, Article 15. For commentary, see e.g. Waelbroeck, “Twelve feet all dangling down and six necks exceeding long”, in Ehlermann and Atanasu (Eds), *European Competition Law Annual*, 2002: Oxford, Hart, p. 470-471.

⁴ See inter alia Eilmansberger, “The Green Paper on damages action for breach of the EC antitrust rules and beyond”, (2007) 44(2) CMLRev 431, especially pp. 439-440 and 477-478; more recently, mutatis mutandis, Ottanelli, “Follow-on antitrust damages' actions and access to justice: illusion or reality?”, (2016) 22(1) Int. LTR 1, pp. 2-3.

⁵ Green Paper, cit. (fn. 2), para. 2.9; see also para. 2.3.

⁶ Id., para. 2.2; see also para. 2.6 and 2.1.

⁷ Id., para. 2.3.

⁸ Id., para. 2.4; see also para. 2.5

the 2008 proposals failed to find a way into concrete legislative action, ostensibly out of a concern for avoiding the fragmentation of the domestic rules governing civil justice and in accordance with important general principles of EU law, such as that of national autonomy.⁹

The Member States, for their part, did not “stand by” in the face of growing concerns surrounding the continuing effectiveness of the *Crehan* cause of action¹⁰ but engaged in a lively debate as to what could be done to remedy the status quo in their jurisdictions and even resulted often in concrete legislative action being taken.¹¹ A telling example of the growing awareness of these issues can be found in the experience of the United Kingdom, where the Competition Act 1998 was enacted and further reformed in 2002 with a view to making competition claims easier to lodge. According to the extensive study conducted by Rodger and concerning the development of competition litigation in this jurisdiction, since the accession of the United Kingdom to the then EEC and until 2004 there had been a total of ninety ‘competition cases’ and eighty-six judgments had been handed down.¹²

The study showed that the enactment of the Competition Act 1998, while it had not led to an immediate increase in the rates of litigation, may have increased the level of awareness among potential claimants of the remedies available to them under EU and domestic competition law.¹³ Consequently, it was suggested that the slow but steady growth in new claims may have been owed to plaintiffs having become more inclined to “go to court” to seek relief of prima facie antitrust injuries.¹⁴ These initially rather lacklustre outcomes can be compared with evidence of the litigation rates in the years between, respectively, 2005 and 2008 and 2009 and 2012.¹⁵ In the former period a positive trend in the number of new cases as well as of judgments being given was highlighted, with 41 decisions being handed down and 27 new cases being lodged in the courts.¹⁶

Importantly, the study found that a relative majority of cases had been litigated before the ordinary civil courts and not in the CAT—respectively, twenty-five against nine.¹⁷ As for follow-on cases, it was further observed that, despite the efforts being made toward making this forum more accessible, only four out of the six cases of this nature had been lodged with the Tribunal.¹⁸ These trends did not appear to change for the period between 2009 and 2012: it was shown that to the steady increase registered up until 2009 a “peak” had followed in 2010 and 2011, with, respectively, fourteen and sixteen new claims. Overall, Rodger found that in this period forty-four new judgments had been delivered.¹⁹ It was also suggested that, for England and Wales, the High Court had emerged as the forum “of choice” for the majority of these cases, as opposed to the CAT.²⁰ Broadly consistent

⁹ See European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC competition rules, 2008/2154/INI, available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0187+0+DOC+XML+V0//EN>, especially sections C and H; also Eilmansberger, cit. (fn. 4), pp. 441-442.

¹⁰ Study on the conditions of claims for damages in case of infringement of the EC competition rules, 31 August 2004, available at:

http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf (hereinafter referred to as ‘Ashurst report’), para.1.

¹¹ See e.g., for the United Kingdom, Rodger, ‘Competition law litigation in the UK’ (2006) 27(5) *European Competition Law Review* 235 at 237.

¹² *Id.*, pp. 243-244.

¹³ *Id.*, p. 244.

¹⁴ Rodger, *ibid.*, Part III of the study, (2006) 27(7) GCLR 341 at 349.

¹⁵ Rodger, “Competition law litigation in the UK courts”, (2009) 2(2) GCLR 93 and (Part II) 2(3) 136; “Competition law litigation in the UK courts: a study of all cases 2009-2012”, (2013) 6(2) GCLR 55.

¹⁶ Rodger, cit. (fn. 15), Part I, p. 96.

¹⁷ *Id.*, p. 98.

¹⁸ *Id.*, pp. 100-101.

¹⁹ Rodger, cit. (fn. 15) (2013), p. 57.

²⁰ Rodger, *loc. ult. cit.*, p. 96.

with the steady growth in litigation rates was also the increased frequency of out-of-court settlements for competition disputes and especially for follow-on claims.²¹

Against this background, while it can certainly be agreed with Rodger's observations that the state of the UK civil competition litigation is still in a state of "relative infancy" there have been significant signs of growth in this area.²² It is added that the legislative reform agenda initiated in 2012, which eventually led to the root-and-branch reform of the UK's public enforcement framework, blew more wind in the sails of the development of private antitrust litigation.²³ The 2015 Consumer Rights Act, which was built on the all-important set of proposals concerning civil litigation in the field of competition, tabled by the Government in 2013, encompassed all the key features of competition cases, ranging from the rules on standing to those on settlements;²⁴ perhaps most importantly, it boosted the role of the CAT, by conferring it the power to hear all competition claims, including the stand-alone ones, and aimed to empower small claimants by laying out an "opt-out" style collective action which could be brought before the Tribunal, subject to stringent admissibility scrutiny.²⁵

The above analysis can be read as suggesting that United Kingdom, just as other member states, has made significant efforts to facilitate the recourse to civil justice and more generally to private mechanisms for the cessation of anti-competitive practices and for the restoration of harm arising from these forms of illegal behaviour.²⁶ It is submitted that these developments occurring at domestic level were neither unexpected nor contrary to EU law: they were not unexpected due to the growing importance of civil competition claims and more generally of safeguarding the rights of consumers more generally at national and at EU level.²⁷ Nor were they inconsistent with EU law: as was anticipated, the principle of national autonomy expressly safeguards the power of the member states to determine the conditions of access to justice for individuals whose rights founded in EU law have been infringed, albeit subject to caveats of effectiveness and of equivalence.²⁸

It is however equally apparent that the emergence of numerous and diverse legislative initiatives in each of the member states created the risk of inconsistency in the way in which the rights of the antitrust victims would be protected across the internal market.²⁹ As a result, it was not surprising that despite the difficulties that it had hitherto encountered, the EU Commission would push once again for the minimum harmonisation of the rules governing selected aspects of competition

²¹ *Id.*, p. 92-93.

²² Rodger, *cit.* (fn. 15), p. 65.

²³ *Id.*, p. 66.

²⁴ Consumer Rights Act 2015, Chapter VIII. See e.g. UK Government, Dept. for Business, Innovation and Skills, "Private actions in competition law: a consultation on options for reform—Government response", February 2013, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf, see e.g. para. 6.42-6.45; also 5.17-5.23.

²⁵ *Id.*, see Chapter 4.

²⁶ See e.g., for Italy, Codice del Consumo (Consumers' Code), approved with Decreto Legislativo (Statutory Instrument) No. 206 of 6 September 2005, last updated by Decreto Legislativo No. 21 of 21 February 2014; see also the study conducted by Peyer in respect of the position in Germany: Peyer, "Myths and untold stories — private antitrust enforcement in Germany", UEA—Centre for Competition Policy Working Paper No 10-12, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695.

²⁷ See inter alia Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning the violation of rights granted under EU law, 11 June 2013, (2013/396/EU), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013H0396&from=EN>, see especially Preamble, Recital 1 and 12-14.

²⁸ See e.g., *mutatis mutandis*, case C-312/93, *Peterbroeck and others v Belgium*, [1995] ECR I-4599, para. 12.

²⁹ See Directive 2014/104/EU on antitrust damages actions, [2014] OJ L349/1 (hereinafter referred to as 2014 Directive), Preamble, Recital 8; see also Impact Assessment Report accompanying the Draft Directive (COM(2013) 404 final), para. 52-55; Draft Directive, pp. 8-9; see also, inter alia, Kortmann and Swaak, "The EC White Paper on antitrust damages: why the Member States have a right to be (less than) enthusiastic", (2009) 30(7) ECLR 340 at 350-351.

litigation, so that the “inequalities and uncertainty concerning the conditions under which” these claims should be brought would be addressed.³⁰ The next section will provide an overview of its provision and concentrate on the rules aimed at correcting the “information asymmetry” that often exists among the litigants in these cases where the evidence tends to be complex and within the control of the defendant.

2.2. The 2014 Directive on competition damages at a glance...

The previous section provided a summary account of the attempts to facilitate the bringing of competition lawsuits made both at EU and at member states' level. This section will discuss briefly the key aspects of the 2014 Directive. It may be noted, first of all, that in comparison with earlier proposals the Directive focused only on a selected number of areas that had been regarded as potentially hindering access to justice for antitrust victims.³¹ According to the Directive's Preamble, its overarching goal is to achieve a “level-playing field” in respect of the rules governing these claims so that the risk of forum shopping can be reduced:³² its purpose is therefore to set out a core of minimum safeguards for plaintiffs in respect of issues of standing, disclosure of evidence and limitation periods and of the complex interplay between enhancing civil litigation and maintaining effective public enforcement, albeit within the overarching principle of national autonomy.³³

It may also be noted that, unlike earlier attempts at introducing similar harmonising legislation, the Directive provides a reasoned justification as to its legal basis and as to the measure's compliance with principles of subsidiarity and proportionality. The EU legislature identified as joint legal bases the two provisions of Article 103(1) and 114 TFEU, concerning, respectively, the power to adopt measures aimed at giving effect to the Treaty's own competition rules and the power to harmonise those aspects of domestic law that, whether actually or potentially, could hamper the good functioning of the internal market.³⁴ The Assessment Document accompanying the Draft Directive stated that recourse only to Article 103 TFEU, which dealt with the Union's exclusive competence adopt competition policy measures, would not have been sufficient to justify adopting measures in this area.³⁵ It was stated that since the maintenance of such an “uneven playing field” as to how these claims could be lodged could have distorted the functioning of the internal market, recourse to Article 114 TFEU would have provided a necessary, additional legal basis to justify action in this field.³⁶

As to the issue of compliance with the principles of subsidiarity and proportionality, the Directive's Preamble went beyond generic assertions as to the “underdevelopment” of private competition enforcement and instead identified specific aspects in respect of which the introduction of common rules in this area is going to bring “significant added value”. It was stated that a uniform discipline as to the interaction between civil litigation and public enforcement would have provided a consistent solution to the question of how these two tools for the application of the competition rules could have been coordinated with a view to securing uniform standards of effectiveness of public

³⁰ Impact Assessment report, cit. (fn. 29), p. 8.

³¹ See inter alia Jones, “Private enforcement of EU competition law: a comparison with, and lessons from the US”, TLI Think Paper 10/2016, available at: <http://ssrn.com/abstract=2715796>, pp. 17-18.

³² See Draft 2014 Directive, cit. (fn. 29), p. 12; see also Impact Assessment Report, cit. (fn. 29), para. 194-195.

³³ Ibid.; for commentary, see e.g., mutatis mutandis, Slot, “Does the Pfleiderer judgment make the fight against cartels more difficult?”, (2013) 34(4) ECLR 197 at 205-206.

³⁴ See Directive 2014/104/EU on antitrust damages actions, [2014] OJ L349/1 (hereinafter referred to as 2014 Directive), Preamble, Recital 8; see also Impact Assessment Report accompanying the Draft Directive (COM(2013) 404 final), para. 52-55; Draft Directive, cit. (fn. 29) pp. 8-9; see also, inter alia, Kortmann and Swaak, “The EC White Paper on antitrust damages: why the Member States have a right to be (less than) enthusiastic”, (2009) 30(7) ECLR 340 at 350-351.

³⁵ Impact Assessment Report, cit. (fn. 29), p. 8.

³⁶ Ibid.; see also p. 10.

enforcement and especially to safeguards the role of leniency programmes as a detection tool for competition infringements.³⁷

The choice of a Directive was also considered compatible with the principle of proportionality: as regards its content, the Commission submitted that by adhering to the goal of “effective compensation” it remained consistent with the purely restorative function of the damages’ remedy that is prevalent in the Member States’ legal traditions.³⁸ In addition, to the extent that it set a range of binding objectives, it left the Member States with a sufficiently wide measure of discretion in deciding to what extent and how to take action to seek them. In the Commission’s view the choice of a Directive (...) [was] in line with the principle that there should be as little intervention as possible, so long as the objectives [were] achieved”.³⁹

As to its substantive content, the Directive reiterates a number of key principles that has already been recognised by the CJEU as part of the EU law *acquis*, namely the eminently restorative nature of the damages’ remedy as a means of compensation and not of punishment, the conferral of standing to bring an action for damages to “anyone who has suffered harm” as a result of anti-competitive practices and the requirement that compensation be “effective” and thereby encompass both the actual loss suffered by the victim and any lost profits, along with interest.⁴⁰ Paramount to the assessment of harm and in general to all the aspects of a competition claim that have not been expressly affected by the Directive is the principle of national autonomy, according to which it is for national law to determine, among other issues, the burden and standard of proof as to the existence of the elements of each claim, such as, *inter alia*, the existence of a causal link between an infringement and the loss claimed by the plaintiff.⁴¹ This principle is however subject to the caveats of effectiveness and equivalence: domestic law should therefore not make the exercise of the right to obtain compensation for antitrust damages excessively difficult or subject it to conditions that are more onerous than those applicable to “equivalent” causes of action grounded in national law.⁴²

Accordingly, it is submitted that the Directive confirms the view of the competition damages’ remedy as a “systemic tool” which, by securing effective compensation to those harmed as a result of restrictive practices, pursues broader goals of deterrence of future unlawful conduct.⁴³ It has been suggested that promoting access to justice for antitrust victims does not only allow them to receive compensation for their injuries, but also contributes to the overall chance of cartel detection. For this purpose, the Directive sets out common minimum standards in several areas: in addition to the anticipated standing conditions and uniform rules concerning the quantification of harm and to the commitment to the principle of effectiveness, Article 10 sets out common principles in relation to limitation periods and Article 14 concerns the availability of a passing-on defence. Article 18 instead deals with the interplay between the non-judicial resolution of individual disputes and ongoing judicial proceedings; in this specific context, Article 19 limits the scope of the damages’ liability of a settling defendant vis-a-vis the claimant or claimants with which a deal has been struck, thus derogating from the otherwise generally applicable principle of joint and several liability of all competition infringers.

One of the central planks of the minimum harmonisation framework enshrined in the 2014 Directive is the commitment to ensuring a more “level-playing field” between the parties in cases that are normally complex and where evidence is usually within the control of only one litigant, usually the

³⁷ See *id.*, pp. 11-12; also, e.g. Slot, “Does the Pflaiderer judgment make the fight against cartels more difficult?”, (2013) 34(4) ECLR 197 at 205-206.

³⁸ Impact Assessment Report, *cit.* (fn. 29), p. 12.

³⁹ *Ibid.*

⁴⁰ Article 1, 3(2), 2014 Directive; see also Lianos, Nebbia and Davis, *Damages claims for the infringement of EU Competition Law*, 2015: OUP, pp. 36-37.

⁴¹ See Article 3(1) and 17(1), 2014 Directive; see also Preamble, Recitals 4 and 12.

⁴² See e.g. Peterbroeck, *cit.* (fn. 28), para. 11-12.

⁴³ See Lianos *et al.*, *cit.* (fn. 40), pp. 30-31; also, *mutatis mutandis*, case C-557/12, *Kone et al. v OBB Infrastruktur*, [2014] ECR I-1317, para. 32-33.

defendant.⁴⁴ Thus, Article 5 of the Directive obliges the member states to provide for a mechanism of court-ordered disclosure of evidence that is "relevant" to the claim or defence advanced by the party seeking such disclosure and is within the control of another litigant or even a third party. The trial court should assess each application in light of the strict criteria provided in Article 5(4), so as to avoid unduly restricting the right to a fair trial enjoyed by all parties and adversely affecting the confidentiality of "sensitive information". Article 6 sets out a "special regime" governing the disclosure of evidence that is within the control of NCAs: in order to prevent the risk of "over-enforcement" of the competition rules, the Directive introduces a number of special safeguards for evidence gathered in the course and for the purpose of competition investigations, by establishing that the latter cannot be disclosed until the investigation has been closed.⁴⁵

Perhaps more importantly, the Directive excludes outright "leniency statements" and "settlement proposals" from the type of evidence whose disclosure can be ordered by the trial court in the course of civil proceedings,⁴⁶ thus addressing the broader question of how to enhance the role of civil litigation as a "systemic" tool for competition detection and deterrence without depriving the promise of immunity in exchange for cooperation as a means of boosting public enforcement.⁴⁷ Ensuring the effective coordination between civil litigation and the action of competition agencies, while at the same time assisting claimants in establishing their case, is also at the basis of Article 9 of the Directive:⁴⁸ this provision obliges the member states to recognise probative legal value as to the existence of a competition infringement to NCAs' decisions, for the purpose of proving liability in court.⁴⁹ Article 11(2) further states that decisions adopted by competition agencies in different EU jurisdictions should provide *prima facie* evidence of a competition breach and therefore be subject to the appreciation of the trial court along with other relevant evidence.⁵⁰

In light of the above analysis it may be concluded that while not being as wide-ranging as originally envisaged, the 2014 Directive seeks to enhance the role of competition litigation as a tool for the detection of competition infringements, through an increased threat of damages liability. At its core is a concern for "levelling the playing field" between litigants, especially when it comes to accessing the evidence that in complex cases such as these is required to establish a damages' claim, and at the same time for maintaining the effectiveness of public enforcement. It is however also apparent that to the extent that the Directive only sets out minimum common rules in a selected number of areas, its provisions, when transposed, are going to have to "interact", in accordance with the principle of national autonomy, with the domestic rules governing litigation in domestic courts and which are often substantially different from jurisdiction to jurisdiction. The next sections will explore the implications of this *prima facie* "tension" between minimum harmonisation and normative diversity having regard to issues of accessibility of evidence that may be held by either one of the litigants or by a third party, including a NCA, so as to gauge to what extent the Directive is likely to achieve its goals of greater access to justice without impinging upon the fair and sound administration of justice in these cases.

⁴⁴ See 2014 Directive, Preamble, Recital 38.

⁴⁵ 2014 Directive, Article 5; see especially Article 5(4); see also Preamble, Recital 34-35.

⁴⁶ *Id.*, Article 6(4); see also Preamble, Recital 36; see also, *mutatis mutandis*, Recitals 38-39.

⁴⁷ *Ibid.*; see also Lianos *et al.*, (cit. 40), pp. 232-233.

⁴⁸ 2014 Directive, cit. (fn. 36), Preamble, recitals 32 ff.

⁴⁹ See also *id.*, Recitals 32, 34.

⁵⁰ *Id.*, recitals 34-35.

3. Powers of disclosure of evidence in competition cases after the 2014 Directive: “walking on a tightrope”?

3.1. Judge-ordered disclosure of litigant-held documents: balancing the principle of ‘equality of arms’ with the right to a fair trial for all litigants

The previous sections provided a brief overview of the complex path that eventually led to the 2014 Directive on competition damages actions and outlined its main features. It was highlighted how one of its core objectives is the concern for correcting the information asymmetry that usually arises between the plaintiff and the defendant. The purpose of this section will be to analyse the rules contained in Articles 5 and 6 of the 2014 Directive, which enshrine a common minimum standard governing the disclosure of the evidence that may be within the “control” of one of the litigants or of a third party so that this perceived inequality can be redressed without impairing the effectiveness of other detection and enforcement instruments.⁵¹

According to Article 5(1) the member states must empower the “competent authorities” (such as the domestic courts having jurisdiction to hear competition law disputes) to order, upon application, to another litigant or to a third party to hand over to the applicant any evidence that “lie within their control” so that the former can prove the existence of their claim or defence. This power is however subject to a number of limits and safeguards aimed at reconciling the observance of the right of access to justice, in accordance with the principle of equality of arms and with general due process rules, with the overarching obligation to protect the confidentiality of “sensitive information”.⁵² Accordingly, the national court must be satisfied that the applicant’s claim is “plausible” and is supported by a “reasoned justification, containing reasonably available facts and evidence” of a *prima facie* case. The applicant must also be able to point to precisely identified items of evidence or to “identifiable categories of evidence”.

To avoid the risk of “fishing expeditions” Article 5(3) and (4) oblige domestic judges to consider the legitimate interests of all parties and thus to have regard to whether the request is warranted in light of the nature of each claim and of the supporting evidence as well as to the scope and costs linked to the proposed disclosure. The court must also examine whether the requested evidence is likely to be relevant for the litigants and, if its nature is “sensitive”, it can devise “arrangements (...) for protecting such confidential information (...)”. The foregoing analysis indicates that in an effort to provide a “minimum level of disclosure *inter partes*”⁵³ Article 5 threads a fine line between considerations of due process and sound administration of justice, to the benefit of all litigants,⁵⁴ and the concern for allowing those among them that are weaker and more disenfranchised to obtain the evidentiary material they require to substantiate their claim.⁵⁵

The approach enshrined in the Directive may be compared with the interpretation of the ‘equality of arms’ rule adopted by the Court of Justice of the EU (CJEU) in respect of EU public competition enforcement: as was reiterated by the General Court in, among other cases, the very

⁵¹ See e.g., *mutatis mutandis*, 2008 EU Commission White Paper, cit. (fn. 2), para. 2.2; see also Lianos et al., cit. (fn. 40), p. 240.

⁵² See 2014 Directive, cit. (fn. 29), Preamble, Recital 23; see also Recitals 21 and 22.

⁵³ 2008 EU Commission White Paper, cit. (fn. 2), para. 2.2.

⁵⁴ See 2014 Directive, cit. (fn. 29), Preamble, recital 15, 16 and 19. See also Proposal for a Directive, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>, p. 4; for commentary see *inter alia* Vandenborre et al., “Actions for antitrust damages within the European Union”, (2014) 7(1) GCLR 1, especially pp. 3-4.

⁵⁵ See *inter alia* Gamble, “The European embrace of private enforcement”, (2014) 35(10) ECLR 469, especially pp. 478-479; also *id.*, “The Parliament, the Commission and the Court - three institutions and their effect on private enforcement of anti-competitive conduct in the EU”, (2015) 36(12) ECLR 501, pp. 503-504; see also Juska, “The future of collective antitrust redress: something new under the sun?”, (2015) 8(1) GCLR 14 at 23-24.

recent *Re: Bathroom Fittings Cartel* appeal decision,⁵⁶ “it cannot be for the Commission alone to decide which documents are of use for the defence” of the investigated undertakings; consequently, the latter must be able to decide whether or not to use any of these documents to deny the existence of (and the ensuing liability for) the alleged breach.⁵⁷

As a result, the investigated undertakings should be allowed access to the case file according to the same rules that apply to the investigating authority and subject only to limits dictated by “weighty” concerns for the continuing protection of commercially sensitive material whose disclosure can jeopardise present or future cartel detection.⁵⁸ The forgoing analysis can be read as suggesting that Article 5(3) and (4) respond to the same concern, albeit in the different context of civil litigation, since they aim to balance consideration of effectiveness in the public enforcement of the competition rules with the demands of access to justice for victims of anti-competitive behaviour,⁵⁹ so that they can effectively exercise the right, granted to them by EU law, to claim compensation for the loss they suffered as a result of the infringement of the Treaty antitrust rules.⁶⁰ It is however equally clear that to the extent that the Directive brings about the harmonisation, albeit minimal, of the rules concerning the disclosure of evidence in competition cases, it is destined to interact with often diverse principles and approaches governing the power of domestic courts, in accordance with tenets of “due process”, to determine the limits of a dispute pending before them and in particular the identification and acquisition of the evidence required to allow them to adjudicate individual claims.⁶¹ In addition, it is suggested that the Directive’s renewed commitment to observing the EU principle of national autonomy requires that these rules be implemented in accordance with the requirements of effectiveness and equivalence.⁶²

Although the limited remit of this contribution does not allow for any in-depth analysis of these issues in light of the various domestic regimes in force across the EU, it is helpful to draw a summary comparison between the relevant rules in force, respectively in Germany and (for proceedings pending before the High Court) in England and Wales. German civil procedure does not impose any obligation on the parties to disclose relevant information and evidence either in advance of or during a trial, with limited exceptions. Thus, the Civil Code allows plaintiffs to “inspect documents in possession of another person”, but only if it can be shown that these documents were created “in the interest of the claimant”⁶³ and their discovery is necessary to establish the “truth” of the facts at issue in the trial.⁶⁴ Nonetheless, this power cannot be exercised in a way that unduly interferes with the right to privacy enjoyed by the litigant from which disclosure is sought and, more generally, with principle of “procedural economy”.⁶⁵

Having regard to competition cases, the courts have come to recognise that a general requirement of “good faith” requires the defendant to disclose to a plaintiff who has successfully established the existence of an infringement the evidence that may be necessary to establish other elements of the claim, such as the quantum of damages, disclosure seems on the whole difficult to obtain.⁶⁶ As to the disclosure of document held by the competition agency, a party to civil proceedings can petition the Bundeskartellamt to disclose any document contained in the case file that may be

⁵⁶ Case T-379/10, *Keramag and others v Commission*, [2013] ECR II-457.

⁵⁷ *Id.*, para. 265.

⁵⁸ See e.g. *id.*, para. 262-263, 278.

⁵⁹ *Ibid.*; see also, among others, case T-410/03, *Hoechst v Commission*, [2008] ECR II-88, para. 145.

⁶⁰ See e.g. *Lianos et al.*, cit. (fn. 40), pp. 22-24; see also p. 29-30.

⁶¹ See inter alia Guttuso, “The enduring question of access to leniency materials”, (2014) 7(1) GCLR 10, pp. 17-18.

⁶² See inter alia case C-473/00, *Cofidis*, [2002] ECR I-10875, para. 28, 35-36.

⁶³ Rodger (ed), *Competition law comparative private enforcement and collective redress across the EU*, 2014: Leuven, Kluwer Law International, pp. 48-50.

⁶⁴ See Guttuso, cit. (fn. 61), p. 17.

⁶⁵ *Ibid.*

⁶⁶ Rodger, cit. (fn. 63), pp. 48-49.

relevant to his or her claim, with the exception of leniency statements and of any document whose revelation may prejudice an ongoing investigation.⁶⁷

The position in Germany may be contrasted with the rules in force in England and Wales: having regard to proceedings before the High Court Part 31 of the Civil Procedure Rules (CPR) obliges every litigant to disclose all the evidence that is "relevant to the litigation, including [documents] that harm his own case or support the other party's case".⁶⁸ Disclosure can also be ordered by the trial judge and failure to comply with this obligation can lead to an array of adverse consequences for the defaulting party: these encompass the inability to "rely on an undisclosed document" to being found in contempt of court.⁶⁹ The trial court, however, can, when ordering discovery of evidence, grant appropriate safeguards for "sensitive" documents: it can, inter alia, redact these documents or restrict their access to a limited number of individuals.⁷⁰

Having regard to proceedings before the Competition Appeals Tribunal (CAT), it may be noted that the revised Rules of Procedure, adopted in 2015 after the enactment of the Consumer Rights Act, have boosted the Tribunal's powers in this area:⁷¹ thus, according to the new Rule 21, the Tribunal can give "directions" to the parties in respect to, inter alia, the "issues on which it requires evidence" and in that context can decide "whether it would be just and proportionate" to admit or exclude any relevant items of proof.⁷² The CAT can examine whether any "prejudice" could derive to one or more of the litigants "if the evidence was admitted or excluded" and assess whether, if specific evidence was not available to it, it can still adjudicate the dispute.⁷³ In addition, the Tribunal can rely on its strong case-management powers to, inter alia, require the "full and early disclosure" of the parties' pleadings, determine relevant factual and legal issues as early as practical, to call witnesses and to order the production of any necessary document.⁷⁴

The brief analysis conducted so far indicates that the discovery rules in force in England and Wales allow the litigants relatively wide rights in respect of accessing "relevant" evidence in the course of as well as before trial. Nonetheless, it should be emphasised that, whether the proceedings are lodged before the High Court or before the CAT, the party seeking disclosure cannot engage in any "fishing expeditions" but must identify clearly the documents s/he seeks to access and provide a justification as to why these are relevant to his or her claim or defence.⁷⁵ The applicant must also explain why the case cannot be adjudicated without that evidence being produced.⁷⁶

It is therefore submitted that Article 5 of the 2014 Directive represents a valiant attempt to balance concurring interests for, on the one hand, securing the observance of due process principles to the benefit of all litigants and, on the other hand, achieving the objective of facilitating access to justice for antitrust victims. It is argued that the disclosure mechanism envisaged by the Directive appears to place a justified restriction on the right to a fair trial, enjoyed by all parties to civil competition proceedings, in as much as it places a number of safeguards as to the way in which the trial court is going to exercise its powers, as well as laying out carefully crafted limits as to what

⁶⁷ Id., p.50.

⁶⁸ Id., p. 58.

⁶⁹ Guttuso, cit. (fn. 61), p. 18.

⁷⁰ Ibid.

⁷¹ SI 2015/1648, available at:

http://www.catribunal.org.uk/files/The_Competition_Appeal_Tribunal_Rules_2015.pdf.

⁷² See inter alia 2013 UK Government Response, cit. (fn. 24), para. 4.6; see also 2015 CAT Rules of procedure (2015) No 1648, available at: <http://www.legislation.gov.uk/uksi/2015/1648/contents/made>, e.g. Rule 21.

⁷³ Ibid. For comment see inter alia Rodger, cit. (fn. 63), p. 272.

⁷⁴ Rule 53, CAT Rules, cit. (fn. 72); see e.g. Evidence submitted to the President of the CAT to the House of Lords Select Committee on the Constitution on 27 November 2003, available at: <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldconst/999/3111201.htm>.

⁷⁵ See e.g. *Hutchinson 3G UK Ltd v O2 UK Ltd*, [2008] EWHC 55, especially para. 38, 40.

⁷⁶ Ibid.; see also para. 50-52.

documents are susceptible to being handed over by court order.⁷⁷ It is however undeniable that how these objectives will be achieved in concreto depends on the way in which Article 5 will be transposed in the laws of each member state⁷⁸ and in particular on the impact that this provision is likely to have on the diverse approaches to evidence questions in force in individual jurisdictions.⁷⁹

Having regard to the position in the United Kingdom, a distinction may be drawn between the perspective impact of the Directive on the Rules of Procedure adopted for the Competition Appeal Tribunal, especially as a result of the 2015 reforms, and its implications for the application of the discovery rules in force for proceedings pending before the High Court in England and Wales. In respect of the former, it is suggested that the existing rules, and in particular the new version of Rules 21 and 53 already go a considerable way toward securing compliance with the minimum, common principles set out in the Directive.⁸⁰ It is submitted that the emphasis placed on the need to assess disclosure applications in light of criteria of proportionality, fairness and having regard to the relevance of the evidence being sought to the applicant's case is broadly consistent with the objectives and the approach characterising the Directive and in particular for the concern, clearly expressed by the EU legislature, for providing a balanced solution to the question of how to reconcile the demands of "due process" with the right of access to justice, especially for those plaintiffs who may be unable to access secret and often complex evidence.⁸¹

As to the potential impact that the Directive could have on the High Court's Rules of Procedure, it was anticipated that CPR 31 provides for a relatively generous discovery mechanism, which, at least in the face should contribute to securing the central objectives of the Directive and in particular uphold common criteria of 'fairness' and 'proportionality'.⁸² Some commentators, however, argued that, on a closer look, the Directive, once transposed in domestic law, may actually result in a higher threshold for claimants seeking to have access to evidence 'within the control' of other litigants or of third parties, to the extent that it requires applicants to provide "facts and evidence" in support of their claims when petitioning for disclosure—a requirement that is not encompassed by the domestic rules of procedure.⁸³ It was suggested, not without merit, that this *prima facie* conflict is likely to be resolved when the Directive is implemented: commentators expressed the view that if the competent authorities regarded CPR 31 as being sufficient, in its current state, to meet the requirements of Article 5, no change would likely intervene.⁸⁴ However, they also pointed out that an amendment to the domestic civil procedure rules could not be excluded: although it was acknowledged that a concern for consistency could justify changing the relevant procedural rules so as to incorporate the conditions enshrined in Article 5, it was submitted that this change could lead to the imposition of an additional hurdle on the party seeking disclosure, thus potentially challenging the requirement of effectiveness.⁸⁵

It is added that the transposition of Article 5 is likely to lead to even greater inroads with established domestic procedural rules in Germany: as was illustrated earlier, while the trial court can identify the issues at stake in individual cases, along with the evidence required to prove claims and defences linked to them, the judge's power to order disclosure of specific documents is strictly limited, ostensibly out of a concern for upholding general principles of procedural economy and constitutional

⁷⁷ See *inter alia* 2013 UK Government Response, para. 4.6; see also 2015 CAT Rules of procedure (2015) No 1648, available at: <http://www.legislation.gov.uk/uksi/2015/1648/contents/made>, Rules 21 and 53; for commentary, see *inter alia* Rodger, *cit.* (fn. 63), p. 272.

⁷⁸ See e.g., *mutatis mutandis*, 2014 Directive, *cit.* (fn. 29), Impact Assessment document, para. 49-52.

⁷⁹ See *inter alia*, Komninos, "Effect of Commission Decisions on private antitrust litigation: setting the story straight", (2007) 44 (5) CMLRev 1387, pp. 1419-1420.

⁸⁰ See 2015 CAT Rules of procedure (2015) No 1648, available at: <http://www.legislation.gov.uk/uksi/2015/1648/contents/made>, especially Rule 21.

⁸¹ See e.g. Kwan, "The damages' Directive: end of England's eminence?", (2015) ECLR 455, pp. 458 and, *mutatis mutandis*, p. 459.

⁸² *Id.*, p. 458-459.

⁸³ *Id.*, p. 460.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

safeguards of privacy.⁸⁶ Against this background, it is submitted that the implementation of Article 5 could lead to a significant departure from this rather strict approach to court-ordered disclosure of evidence by requiring the trial court to balance these important safeguards against concerns for the access to justice of individual applicants and for the continuing observance of the EU law principle of effectiveness. Although it may be agreed with commentators that this outcome could be in itself positive for the victims of anti-competitive behaviour,⁸⁷ it is admittedly unclear at this stage to what extent the Directive's objectives will be fulfilled in the framework of German civil procedure, which appears, instead, to be characterised by a vision of the trial court as a "less proactive" actor (albeit for entirely legitimate reasons) than in other jurisdictions.⁸⁸

In light of the forgoing analysis it may be concluded that Article 5 of the Directive must certainly be welcomed as a means of redressing the imbalance between litigants in competition cases as regards the availability of the evidence that may be "relevant" for their claims or defences. However, it leaves many questions open as to how its provisions will be implemented in each member state, where these issues have been dealt with in often very different ways. The "tension" between the commitment to a more "level-playing field" across the EU and the continued observance of the principle of national autonomy, together with concerns for maintain an effective public enforcement of the competition rules, seems to emerge even more clearly when it comes to a "special category" of evidence, namely 'leniency statements' and, more generally, documents within the control of competition authorities. The issues arising from the interplay of these concurring, if not competing concerns will be examined more closely in the next section.

3.2. Coordinating private litigation and public enforcement in competition cases: disclosure of NCA-held evidence and Article 6 of the 2014 Directive—the case of leniency documents

The previous section analysed the approach adopted by the 2014 Directive in respect of the disclosure of evidence relevant to a competition claim or defence in civil proceedings. It was illustrated that while the Directive aims to engender minimum harmonisation in this area, significant uncertainty surrounds the outcome of its transposition, due to the diverse approaches that have prevailed in the Member States' jurisdictions. It is observed that the possibility for litigants to petition the courts with a view to obtaining the disclosure of evidence held by "third parties" raises the additional, all-important question of the extent to which this power may be deployed with a view to obtaining access to evidence gathered by NCAs in the course of their competition investigations.⁸⁹

The purpose of this section will be to analyse some of these issues in light of the more general concern of how public competition enforcement and private antitrust litigation can be reciprocally coordinated. In particular, it will be investigated whether and how allowing claimants to obtain evidence contained in the NCAs' "case files" in the interest of a full access to justice, can be reconciled with equally weighty concerns for maintaining the secrecy of their investigation, a factor which is fundamental to allow their enquiries to be exhaustive and effective in terms of cartel detection.⁹⁰ In this context, regard will be had especially to the position of leniency statements.

In general, it may be noted that antitrust victims often consider documents contained in the case file of the competition agencies to be 'objet du desire' as they seek to build their case against a defendant who is either under investigation or has been already sanctioned by the competent NCA

⁸⁶ See e.g. Guttuso, cit. (fn. 61), p. 17; also Rodger, cit. (fn. 63), p. 49.

⁸⁷ Matkasch et al., "The new EU directive on cartel damages claims from a German law perspective", (2015) 8(2) GCLR 60, p. 67-68.

⁸⁸ Id., p. 64.

⁸⁹ See e.g., for the UK, 2013 Response, cit. (fn. 24), para. 7.1-7.3.

⁹⁰ See for the UK, id., para. 7.3; for the position adopted by the EU Court of Justice, see inter alia, case C-110/10, Solvay SA v Commission, [2011] ECR I-10439, para. 48; also case T-67/10, JCB v Commission, para. 68; case T-36/91, ICI plc v Commission, [1995] ECR II-1847, para. 45-46, 97-99, 102-105.

before the civil courts.⁹¹ However, whether and on what legal basis they, as third parties vis-à-vis the competition proceedings, can claim access to these documents has been subject to great debate: having regard to the position vis-à-vis the EU Commission, the EU Courts recognised in principle that third parties could have such access.⁹²

Nonetheless, no indication was given as to how this entitlement should be exercised, either before the EU Commission or in respect of NCAs' investigations.⁹³ The possibility that third parties could have sight of often "sensitive" information was regarded as requiring considerable caution: having regard to the parties subjected to investigation, the duty to keep evidence secret responded to demands of privacy and of their rights of defence, as well as to the need to protect their commercial interests.⁹⁴ As to the position of third parties, the EU Courts have taken the consistent view that maintaining the secrecy of such information and subjecting it only to limited exceptions responded to the need for ensuring that a "steady flow of information" could reach the investigating officials without the fear of "reprisals".⁹⁵ The likelihood that damages claimants could obtain access to "leniency statements" and more generally to material akin to an "admission of guilt" as regards a competition law breach was considered even more problematic: on the one hand, it was argued, not without merit, that such access could have jeopardised the promise of immunity as a tool for securing greater cartel detection.⁹⁶ On the other hand, it was objected that to refuse disclosure outright and in all cases could have led to a successful whistleblower enjoying an undue advantage by de facto being "shielded" from damages liability.⁹⁷

These questions became even more urgent as a result of the evolution of the case law of the EU Courts. In the *CDC* and *EnBW Energie* decisions, the General Court considered whether and to what extent the generally applicable Transparency Regulation, i.e. Council Regulation No 1049/2001, could provide a third party with the possibility to obtain sight of documents held in the EU Commission's case file, including leniency statements and documents reproducing their content. In *CDC*,⁹⁸ the Court expressed the view that, in general, the demands of the effectiveness of the Commission's inquiries, if necessary through the promise of immunity, could act as a ground upon which to justify a restriction in the right of access to documents of the applicant:⁹⁹ however, it took the view that for this purpose it would not have been sufficient for the Commission to provide a generic justification, based on the need to maintain the ongoing secrecy of current inquiries.¹⁰⁰ Instead, the Commission was obliged to assess, on a case-by-case basis, whether the disclosure of specific documents, assessed one by one, could have harmed its investigations.¹⁰¹

The General Court's position was, however, overturned by the Court of Justice in the *EnBW* appeal judgment:¹⁰² the CJEU took a remarkably more "enforcement friendly" view of the question of whether protecting the confidentiality of documents submitted in the course of cartel investigations.¹⁰³ It held that the right of access to documents was not unlimited and could only be

⁹¹ See inter alia Lianos et al., cit. (fn. 40), pp. 249-250.

⁹² Id., pp. 251-252; see e.g. case T-353/94, *Postbank NV v Commission*, [1996] ECR II-921, especially para. 70-72.

⁹³ Ibid.

⁹⁴ See inter alia, *Postbank*, cit. (fn. 92), para. 85-88.

⁹⁵ See inter alia, mutatis mutandis, case T-210/01, *General Electric Ltd v Commission*, [2005] ECR II-5575, para. 650.

⁹⁶ EU Commission, Memorandum accompanying the Draft Directive on competition damages (2013), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>, p. 14.

⁹⁷ See UK 2013 Response, para. 7.9-7.11.

⁹⁸ *CDC Hydrogene Peroxide Cartel damage Claims v Commission*, [2011] ECR II-8251.

⁹⁹ Id., para. 35-36.

¹⁰⁰ Id., para. 36; see also para. 49-51.

¹⁰¹ Id., para. 71-72; see also para. 77. See also case T-344/08, *EnBW Energie v Commission*, [2012] ECR II-242, para. 61-62. For commentary see inter alia Lianos et al., cit. (fn 40), pp. 264-265.

¹⁰² Case C-365/12 P, [2014] ECR I-112, see para. 62-64.

¹⁰³ Ibid.

exercised in a way that was compatible with other relevant considerations, such as the legitimate interest to the ongoing secrecy of the Commission's competition investigations.¹⁰⁴

The Court of Justice acknowledged that maintaining the efficacy of the damages' remedy was central to the effective enforcement of the competition rules: nonetheless it held that the right to obtain compensation of antitrust damages could not act as an overriding public interest and thereby require the Commission to justify, for each item of evidence, why its disclosure should be withheld. It was held that to the extent that the EU legislature had already "balanced out" these concurring interests by means of the Implementing Regulation (i.e. Council regulation No 1/2003), as further given effect to by the relevant Commission secondary rules (namely, via Regulation No 773/2004), the Commission could "presume without carrying out a specific, individual examination of each of the documents (...), that disclosure of such documents will, in principle, undermine the protection of the commercial interests of the undertakings (...) and (...) of the purpose of the investigations".¹⁰⁵ Unless the applicant could demonstrate that there was an "overriding public interest" in the revelation of an individual document, the Commission could have rejected a request of third party access to its investigation files, on grounds of prejudice to an ongoing investigation.¹⁰⁶

The above analysis suggests that, to the extent that third parties sought to rely on general principles of transparency and access to documents in EU law, concerns for the continuing efficiency of EU cartel detection were regarded by the CJEU as providing a reasoned justification to refusing to grant disclosure of documents contained in the Commission's case file, including documents submitted as part of a leniency application.¹⁰⁷ While the "presumption against disclosure" of these documents could be rebutted by the applicant, the Commission could issue a refusal decision concerning a 'bloc' of documents, as opposed to having to consider one by one which one, if disclosed, could materially jeopardise the investigation.¹⁰⁸

Similar questions also arose in respect of investigations occurring at domestic level, thus interrogating more general issues as to the interplay between effective access to justice and the requirements of the principle of national autonomy. The *Pfleiderer* ruling concerned a preliminary reference made in the course of proceedings for the award of competition damages instituted before the German Courts. The plaintiff had initially been granted access to the file held by the German NCA, including documents submitted as part of a plea for immunity in exchange for cooperation, for the purpose of preparing his civil claim.¹⁰⁹

However, following a challenge of this decision, the domestic court sought the assistance of the Court of Justice as to whether the NCA was obliged to disclose all documents, including those being part of the leniency application, to the plaintiff.¹¹⁰ The Court of Justice observed that, in the absence of any EU-wide discipline, the matter of access to the file held by competition authorities investigating EU competition infringements was subject to national law, albeit in the context of and within the limits dictated by the principle of national autonomy.¹¹¹ The Court recognised that exposure to civil liability could adversely affect the "propensity" of cartel members to take advantage of leniency programmes and thereby jeopardise their effectiveness as a detection tool.¹¹² However, it also observed that regard should be had to the need to uphold the right to seek compensation for the damage suffered by third parties adversely affected by the consequences of cartel behaviour.¹¹³

¹⁰⁴ Id., para. 65-66; see also para. 80-83 and 92.

¹⁰⁵ Id., para. 93.

¹⁰⁶ Id., para. 100-101; see also para. 104-106. For commentary see e.g. Rey, "The interaction between public and private enforcement of competition law, and especially the interaction between the interests of private claimants and those of leniency applicants", (2015) 8(3) GLCR 109, p. 117.

¹⁰⁷ Ibid.; see also pp. 124-125.

¹⁰⁸ Id., p. 122; see also Lianos et al., cit. (fn. 40), p. 267.

¹⁰⁹ Case C-360/09, *Pfleiderer*, [2011] ECR I-5161, para. 9-15.

¹¹⁰ Id., para. 17-18.

¹¹¹ Id., para. 23-24.

¹¹² Id., para. 25-26.

¹¹³ Id., para. 28-29.

Consequently, a plaintiff seeking redress from competition damages should not be precluded outright from seeking access to documents obtained by the NCA as a result of a leniency application. Instead, it should be for the national courts to conduct a “weighing exercise (...) on a case by case basis according to national law” before granting or refusing such access, in order to ensure that the right to claim compensation be effective and governed by conditions that are no less favourable than those applicable to “equivalent” causes of action based on domestic law.¹¹⁴ These principles were broadly confirmed in the *Donau Chemie* preliminary ruling,¹¹⁵ where the CJEU stated that to deprive, through a blanket ban, the competent court to carry out this “weighing up” exercise on a case-by-case basis, in light of the relevant domestic rules and of all the circumstances of the case would have made the right of the claimant to seek redress of her antitrust injury excessively difficult to exercise.¹¹⁶ It was held that while protecting the effectiveness of leniency programmes represented a legitimate interest, capable of limiting the reach of the judicial powers of disclosure, it could not have justified a “systematic refusal” to disclose relevant documents.¹¹⁷ To hold otherwise would have been tantamount as to allowing the defendant, who had already benefitted from the immunity—whether partial or total—from financial penalties to “circumvent” its duty to compensate the victims of his or her anti-competitive behaviour.¹¹⁸

The *Pfleiderer* and *Donau Chemie* preliminary rulings are of great importance since they confirm the pivotal role played by principles of national autonomy and judicial independence in all the key aspects of competition litigation, including those concerning the disclosure of evidence that is within the control of the competent NCAs.¹¹⁹ However, this approach was criticised as threatening the effectiveness of the promise of immunity from fines as a means of boosting the rates of detection and sanction of competition infringements.¹²⁰ It was further argued that since the decision as to whether leniency statements or other evidence containing similar “admissions of guilt” had to be adopted in accordance with the relevant domestic rules, the uncertainty as to the outcome of similar requests in the jurisdictions of the various EU member states could have increased.¹²¹ The domestic judicial practice that followed the *Pfleiderer* ruling provides a very telling example of how, due to the impact of the different rules governing disclosure of evidence, the “weighing up exercise” that the national courts are empowered to conduct as a result of the CJEU’s preliminary ruling may yield to different outcomes in each member state.¹²²

In *Pfleiderer* the District Court of Bonn, after weighing up the competing interests pro- and against disclosure, as dictated by the CJEU in its preliminary ruling, rejected the application on the ground that the legitimate interest to maintain the secrecy of the case file and in particular of leniency statements should have enjoyed precedence over equally legitimate interests, such as the concern for greater access to justice for antitrust injury victims.¹²³ It was argued that since the promise of immunity represented perhaps one of the few detection tools that “really worked”, allowing

¹¹⁴ Id., para. 30-32.

¹¹⁵ Case C-536/11, *Donau Chemie*, [2013] ECR I-366, para. 32; see also para. 43.

¹¹⁶ Id., para. 38-39; see also para. 46.

¹¹⁷ Id., para. 43-44.

¹¹⁸ Id., para.

¹¹⁹ See *Pfleiderer*, cit. (fn. 109), para. 31-32. For commentary, Rizzuto, “The procedural implications of *Pfleiderer* for the private enforcement of European Union competition law in follow-on actions for damages”, (2011) 4(3) GCLR 116 at 119; see also p. 121.

¹²⁰ See *inter alia* Rey, cit. (fn. 106) at 110-111.

¹²¹ See *inter alia* Guttuso, cit. (fn. 61), pp. 19-20; also Moodaliyar, “Access to leniency documents: should cartel leniency applicants pay the price for damages?”, (2014) 7(10) Yearbook of Antitrust and Regulatory Studies, 159, pp. 175-176.

¹²² See e.g. Lianos et al., cit. (fn. 40), pp. 268-271.

¹²³ Id., p. 269.

disclosure of these document could have had a tangible, negative impact on the NCA's enforcement action.¹²⁴

The outcome of *Pfleiderer* can be compared with the English High Court's stance in *National Grid*.¹²⁵ Mr Justice Roth noted that a leniency applicant, like any other infringer of the competition rules, was not entitled to any "expectation of confidentiality" outside the NCAs' proceedings and in the context of a court case especially.¹²⁶ In his view, in assessing each disclosure application the court should have had regard to the general principle of 'proportionality' which, in accordance with CPR 31 entailed two distinct questions: the trial judge should have considered whether the evidence could have been obtained from other sources and assessed whether the information being sought was relevant to the claim or defence pleaded by the applicant.¹²⁷ On that basis the High Court allowed the applicant's request: Roth J took into account the complexity of the case at hand, the secrecy of the cartel, the nature of the evidence and in that context the circumstance that the applicant wished to have sight of "excerpts" of the corporate statements that were contained in the confidential version of the infringement decision.¹²⁸

As to the allied question of the extent to which disclosing such information could have had an adverse impact on the efficacy of leniency as a tool for detection, Mr Justice Roth acknowledged that disclosure could have had the "potential effect" of dissuading future applicants from taking advantage of the promise of immunity.¹²⁹ However, he took the view that for a prima facie cartel member to forgo the possibility to obtain immunity from fines in exchange for cooperation out of a concern that his or her declarations could have been disclosed, at a later date, in the course of a hypothetical damages' claim would have been an excessively risky gamble compared with the likelihood of being caught by the NCAs or the Commission.¹³⁰ On that basis it was concluded that to withhold from an applicant evidence that was within the control of a 'third party' —i.e. a NCA—and that was clearly 'relevant' to their plea only on the sole ground that its disclosure could have had a potential, adverse impact on the efficacy of the NCA's leniency policy would have jeopardised the right of the victims of anti-competitive behaviour to obtain redress of the harm they had suffered and thus have been contrary with the general principle of effectiveness.¹³¹

It is argued that the aftermath of *Pfleiderer* in, respectively, Germany and England shows very clearly the practical implications of conferring to the domestic courts the power to perform the "balancing exercise" that the court-ordered disclosure of evidence requires without there being also a degree of harmonisation of the rules governing the conditions according to which information can be revealed. It was suggested that the outcomes reached in the German *Pfleiderer* case and in the English *NGET* dispute respectively were determined by the different approaches to disclosure of evidence in force in each jurisdiction:¹³² while the German Courts were strongly led by a concern for procedural economy and for safeguarding the privacy of the concerned parties, the English High Court was influenced by concerns for the inherent fairness of the proceedings as a whole, including the need to guarantee full access to justice to the claimant.¹³³ It was emphasised that the principle of "proportionality", enshrined in CPR 31, had allowed the High Court to assess in a more flexible and perhaps more "pragmatic" manner the likely impact that disclosing evidence could have had for the

¹²⁴ Ibid.; see also Wardaugh, "Cartel leniency and effective compensation in Europe: the aftermath of *Pfleiderer*", (2013) 19(3) Web Journal of Current Legal Studies, available at: <http://webjcli.org/article/view/251>, p. 15.

¹²⁵ *National Grid Electricity Transmission plc v ABB Ltd*, [2012] EWHC 669 (Ch).

¹²⁶ Per Roth J, para. 39.

¹²⁷ 51-52

¹²⁸ Id., para. 52-53.

¹²⁹ Id., para. 50-52.

¹³⁰ Ibid.; see also para. 55.

¹³¹ Id., para. 52-53.

¹³² Guttuso, cit. (fn 61), p. 19.

¹³³ Id., p. 20; see also Wardaugh, cit. (fn. 124), p. 15-16.

continuing effectiveness of the leniency programme and to reconcile any potential dangers for public enforcement with the demands of allowing greater access to justice for antitrust victims.¹³⁴

In light of the forgoing analysis, it was not surprising that the *Pfleiderer* and the *Donau Chemie* rulings would be met with mixed views among commentators: some scholars welcomed the CJEU's approach, albeit with caution, on the ground that the Court had provided a relatively flexible and at the same time "tightly policed" response to the question of how to reconcile the effectiveness of leniency programmes with demands of access to justice for claimants adversely affected by the "information asymmetry" often characterising competition cases.¹³⁵ Other commentators, along with several stakeholders, however, expressed concern at the uncertainty that could ensue from the *Pfleiderer* "balancing approach", due to the continuing relevance of the principle of national autonomy and to the diversity existing among the laws of the member states in this area.¹³⁶ It was also suggested that maintaining the secrecy of leniency documents could have been justified by concerns for the integrity of public enforcement,¹³⁷ to exclude a priori the disclosure of this evidence could have been detrimental to attaining the goal of the damages' remedy, i.e. providing restoration of harm for antitrust victims.¹³⁸

Against this background, it was inevitable that the question of the extent to which documents collected by a competition authority as a result of a leniency application and in particular statements akin to an "admission of responsibility" for an infringement could be disclosed in court proceedings would have been addressed by the 2014 Directive. As was anticipated in section 2.2, the Directive obliges the member states to provide a "special regime" for discovery applications aimed at obtaining sight of documents held in the competition authorities' case files. Thus, the court seized with the application should assess whether the request relates to individual and well-identified documents as opposed to being "non-specific" in its subject matter, what purpose the request seeks to achieve—and in particular whether it is instrumental to lodging a damages' claim. Perhaps more significantly, Article 5(4)(c) prescribes that the national court should consider to what extent revealing the documents in issue can affect public enforcement.

Article 6 singles out three categories of evidence: according to its subsection 5, documents prepared by the investigated undertaking "specifically for proceedings before a competition authority" as well as those drawn up by the authority itself in the course of an investigation can only be disclosed to the parties of a civil action in respect of which they may be relevant after the investigation has been closed. The same regime applies to "settlement submissions that have been withdrawn". The second group of documents encompasses "leniency statements" and "settlement submissions".¹³⁹ According to Article 6(6) these documents are absolutely immune from disclosure: it is for the trial court to assess the nature of the evidence being requested and thus to determine whether it falls within any of the above categories.¹⁴⁰ According to Article 6(7), if a controversy arises as to whether a piece of evidence falls under subsection 6, the court can, after receiving a "reasoned request" detailing the grounds for disclosure from the interested litigant, ask the competition authority to have sight of the document and thereby adjudicate as to its nature.¹⁴¹ Furthermore, Article 6(8) expressly allows for the partial disclosure of documents containing statements that would be in themselves immune from disclosure, so that the latter can be redacted and the document be

¹³⁴ Wardaugh, loc. ult. cit.; see NGET, cit. (fn. 125), para. 39-40.

¹³⁵ See e.g. Lianos, et al., cit. (fn. 40), p. 270-271; also Guttuso, cit. (fn. 61), p. 20.

¹³⁶ UK 2013 Response, cit. (fn. 24), para. 7.9.

¹³⁷ See e.g. Wardaugh, "Cartel leniency and effective compensation in Europe: the aftermath of *Pfleiderer*", (2013) 19(3) Web Journal of Current Legal Studies, available at: <http://webjcli.org/article/view/251>, pp. 22-23; also Singh, "Disclosure of leniency evidence: examining the Directive on damages actions in the aftermath of recent ECJ rulings", (2014) 7(4) GCLR 200 at 206-207.

¹³⁸ See inter alia UK 2013 response, cit. (fn. 24), para. 7.11.

¹³⁹ See e.g. Singh, cit. (fn. 137), p. 207.

¹⁴⁰ Ibid.

¹⁴¹ See Lianos et al., cit. (fn. 40), p. 255-256.

acquired in the course of civil proceedings.¹⁴² The third, residual category of competition agency-held evidence encompasses “any other document”: these can be disclosed by court order at any time, upon an assessment as to their “relevance” and in light of the criteria laid out by Article 5(3).¹⁴³

In light of the forgoing analysis, it has been suggested that the 2014 Directive has opted for a “decentralised system managed by the national judiciary” as regards requests for the disclosure of evidence held by a competition authority.¹⁴⁴ It was argued that the application of Articles 5 and 6 relies on the central function fulfilled by the trial court, which thanks to the Directive enjoys powers of assessment of the relevance of the evidence vis-à-vis the scope and nature of the dispute and to its proportionality in light of the concurring demands of access to justice and of the continuing effectiveness of public enforcement that are both “strict” and “proactive”.¹⁴⁵ It is however legitimate to query whether the absolute immunity from disclosure chose by the EU legislature as regards leniency documents is compatible with important general principles, such as the principle of effectiveness and also the right of access to a court, enshrined in Article 48 of the EU Charter of Fundamental Rights. According to commentators, preventing the disclosure tout court of these documents in the course of court proceedings has a number of advantages: it limits the uncertainty surrounding the position of whistle-blowers vis-à-vis future damages’ liability that had followed from the *Pfleiderer* decision; it also preserves the incentive to apply for leniency, with clear benefits for deterrence and, as a result, for maintaining a “steady stream” of follow on cases based on infringement decisions that had been adopted as a result of cooperation with cartel members.¹⁴⁶ It was further suggested that the “blanket immunity” enshrined in Article 6(6) of the Directive would be compatible with a view of competition litigation as “ancillary” to public enforcement.¹⁴⁷

Other authors, however, were very critical of the ban¹⁴⁸ and questioned whether de facto subordinating civil litigation to public enforcement was compatible with the CJEU’s position, expressed in *Courage* and *Manfredi* and according to which antitrust damages claims were central to the effectiveness of the Treaty competition rules, without there being any “hierarchy” between the two functions.¹⁴⁹ It was argued that while the importance of public enforcement should not have been ignored, the legitimate interest to fostering private litigation could not have been overlooked.¹⁵⁰ This concern was also raised by the European Parliament’s Economic and Monetary Affairs Committee: the Committee stated that while leniency programmes had proven decisive for detecting new competition infringements, they should not have resulted in successful whistle-blowers being “protected” more than it was necessary, i.e. by shielding them almost completely from the threat of damages’ liability.¹⁵¹ The Committee acknowledged that certain types of evidence merited confidential treatment; however, it took the view that no document should be excluded a priori from disclosure, it being a matter for the trial court to assess whether the party requesting its disclosure should have been granted sight of it, in light of its relevance to the extent to which it could have been obtained by any other means and of any other consideration related especially to the role of the competition agency

¹⁴² Ibid.

¹⁴³ See e.g. Kumar Singh, “Pfleiderer: assessing its impact on the effectiveness of the European leniency programmes”, (2014) GCLR 110 at p. 119.

¹⁴⁴ Lianos et al., cit. (fn. 40), p. 257.

¹⁴⁵ See 2014 Directive, proposal, cit. (fn. 29), pp. 14-15; see also Lianos et al., cit. (fn. 40), p. 257-258.

¹⁴⁶ Inter alia, see Singh, cit. (fn. 137), pp. 209-211; see also p. 206.

¹⁴⁷ Ibid.; see also Wardaugh, cit. (fn. 137), p. 22; see also case C-360/09, cit. (fn. 112), Opinion of AG Mazak, para. 40.

¹⁴⁸ Singh, cit. (fn. 137), p. 209-210.

¹⁴⁹ Id., p. 208

¹⁵⁰ See e.g. European Parliament, Report on the Draft Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union of 4 February 2014, COM(2013)0404, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0089+0+DOC+XML+V0//EN> (hereinafter referred to as Schwab report), recitals 4-5.

¹⁵¹ Schwab report, recitals 19 and 20.

in detecting and sanctioning future breaches: to hold otherwise would also have created the risk of “denying justice” to those claimants who could not obtain the same evidence by other means.¹⁵²

The forgoing analysis appears to illustrate that with the 2014 Directive the EU legislature has endeavoured to “favour” the demands of an effective public enforcement machinery”, which are admittedly well served by relying on the promise of immunity from fines in exchange for cooperation,¹⁵³ at the expense of “promoting antitrust litigation as a means of upholding the effectiveness of the Treaty competition rules.”¹⁵⁴ However, one cannot help but being concerned at the likely impact that the solution enshrined in Article 6(4) of the 2014 Directive may have for future claimants¹⁵⁵ as well as more generally for the continuing observance of the principle of effectiveness, the latter in light especially of the complementary relationship existing between public and private competition enforcement.¹⁵⁶

It has been suggested that the “balancing exercise” devised by the CJEU in *Pfleiderer* had been the Court’s “choice ‘in the absence of EU rules governing the matter’, the issue being left for the domestic legal systems of the member states” until such time as the Union adopted harmonisation measures in this area.¹⁵⁷ To this view, however, it was objected that to the extent that the approach adopted in *Pfleiderer* was justified by the general principle of effectiveness, it would have been legitimately questionable whether the power conferred to the national courts to conduct such “balancing exercise” could have been set aside by legislation.¹⁵⁸ On that basis it was therefore argued that the “blanket ban” provided by Article 6(4) of the 2014 Directive would have been difficult to justify especially in cases in which information that was both “relevant” and “necessary” for the party seeking access to it could not have been obtained in any other way than by way of a court order.¹⁵⁹

In light of the above analysis, it can be concluded that whether the Directive will achieve its stated objectives remains open to question. It is acknowledged that just as in respect of the general rules on disclosure of evidence, much will depend on how its provisions will be transposed in domestic law.¹⁶⁰ Nonetheless, it is argued that the “enforcement friendly” approach enshrined in Article 6(4) may create the risk of “chilling” future claims, especially follow-on ones that may arise from the uncovering of complex and wide-ranging cartels.¹⁶¹ Although the concerns for legal certainty and predictability in the administration of leniency programmes are fully understandable and should be taken into due account, it is however open to question whether the “wholesale exclusion” from disclosure of this and other “sensitive evidence”, as outlined in Article 6 of the Directive, can be fully reconciled with the rights of all litigants, especially the “weaker” ones, to access relevant evidence without being placed at undue disadvantage vis-à-vis the other parties in the proceedings.¹⁶²

¹⁵² Id., recitals 24-25.

¹⁵³ See inter alia Wardaugh, cit. (fn. 137), pp. 20-21.

¹⁵⁴ Geradin and Grelier, “Cartel damages claims in the EU: have we only seen the tip of the iceberg?”, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362386, p. 11.

¹⁵⁵ See inter alia 2013 UK Response, para. 7.11; for commentary, see e.g. Neumayr and others, “The Gordian know of access to file: legislation will have to resolve it”, (2014) GCLR 7(3) GCLR 186 at 190-191; also Gamble, “The European embrace of private enforcement: this time with feeling”, (2014) 35(10) ECLR 459 at 468-469.

¹⁵⁶ See e.g. case C-360/09, cit., (fn. 109), Opinion of AG Mazak, para. 50; for commentary, see inter alia Sitarek, “The impact of EU law on a national competition authority’s leniency programme”, (2014) 7(9) Yearbook of Antitrust and regulatory Studies 185, pp. 194-195 and 200-202; see also Lianos et al., cit. (fn. 40), p. 271.

¹⁵⁷ Lianos et al., ult. loc. cit.

¹⁵⁸ Ibid.

¹⁵⁹ Id., p. 272.

¹⁶⁰ See 2014 Directive, Preamble, Recitals 15-16, 21 and 26; see also Neumayr, cit. (fn. 155), p. 191; also Gamble, “The European embrace of private enforcement: this time with feeling”, (2014) 35(10) ECLR 469 at 468-469.

¹⁶¹ See inter alia Sitarek, cit. (fn. 155), pp. 210-212; see also Lianos et al., cit. (fn.), p. 272; also Neumayr et al., cit. (fn. 155), pp. 190-191.

¹⁶² See Gamble, “The European embrace of private enforcement: this time with feeling”, (2014) 35(10) ECLR 469 at 468-469.

4. The 2014 Directive on competition damages as a "compromise solution" between effective competition enforcement, access to justice and due process --tentative conclusions

The challenge of facilitating the civil litigation of competition cases in the courts of the member states, which has been at the forefront of the Commission's competition policy agenda for a long time, has eventually found an albeit partial resolution in the 2014 Directive on competition damages. As was illustrated in section 2, the Directive provides for the minimum harmonisation of a selected number of issues concerning the access to justice for antitrust claimants and the adjudication of competition disputes. At the core of the EU legislature's effort is the concern for boosting litigation rates without impairing the effectiveness of public enforcement or restricting the right to a due process enjoyed by all litigants (especially by defendants) more than is required to achieve the Directive's policy goals.

Correcting the information asymmetry often characterising the relationship between plaintiffs and defendants in competition cases has proved to be central for the Directive's drafters, due to the ongoing importance of the principle of national autonomy and to the need to ensure that any derogations from generally applicable rules of civil procedure, aimed at ensuring the full effectiveness of the "right to a court" recognised to antitrust victims, do not compromise the integrity of the adjudication of these claims and at the same time to ensure the full effectiveness of the "right to a court" recognised to antitrust victims.

The purpose of this contribution has been to analyse how the 2014 Directive has endeavoured to "thread the fine line" between these concurring—if not often *prima facie* conflicting—interests. It was argued that conferring to the courts of all member states the power to order the disclosure of evidence that was "relevant" to a claim or a defence and could not be reasonably obtained in any other way was clearly consistent with the access to justice rationale underscoring the Directive itself and was in particular targeted at ensuring a "level-playing field" among litigants when it came to accessing information that was "essential" for them to prove their case before the court.

At the same time, it was acknowledged that, due to the continuing relevance of the principle of national autonomy and to the circumstance that the Directive only provided for minimum harmonisation in this area, whether this provision will actually achieve its objectives is going to depend on how the member states will decide to give effect to it. Section 3.1 provided a brief examination of how the courts in, respectively, England and Wales and Germany have dealt with issues of discovery of evidence held by the competent competition agencies and in that context highlighted how the outcome of the adjudication was different in each jurisdiction. On that basis, it was argued that even though the Directive is clearly committed to achieving goals of greater access to justice in accordance with broadly consistent standards of due process and "equality of arms" across the Union, how its provisions are going to impact on the often considerably diverse approaches to issues of disclosure existing in the legal systems of the various member states will be decisive for the achievement of objectives of greater access to a court and more effective "equality of arms" among litigants.

It is however suggested that the future implementation of Article 6, concerning more specifically the court-ordered disclosure of documents held by NCAs, including "sensitive evidence" such as leniency statements, is likely to be even more complex. Section 3.2 examined the "special regime" to which requests concerning the disclosure of these documents are subjected in light of the approach adopted by the CJEU in *Pfleiderer* and *Donau Chemie*: on that basis it was acknowledged that, on the one hand, continuing to safeguard the promise of immunity as a means of eliciting cooperation and thereby facilitating cartel detection would have been indispensable especially in order to encourage follow-on litigation. On the other hand, it was emphasised that to subject leniency documents to an absolute ban against disclosure, without the trial court having any power to consider whether concerns of access to justice could be counterbalanced against the demands of effective public enforcement, may jeopardise the achievement of the central goal of the Directive, namely to facilitate claimants as they seek to build their case before the domestic courts, as well as to contradict the

general principle of effectiveness, especially in cases where the plaintiff was particularly “weak” in terms of his or her ability of obtaining access to relevant evidence.

It can therefore be concluded that the 2014 Directive represents an ambitious attempt to strengthen the right to seek compensation enjoyed by victims of anti-competitive behaviour. Nonetheless, it remains in many ways a "compromise solution" whose success (especially when it comes to addressing the “information asymmetry” existing between litigants)¹⁶³ is likely to depend significantly on the way in which the Member States' authorities will decide to give effect to its objectives,¹⁶⁴ each within the framework of principles governing civil proceedings, both generally and more specifically for competition cases.¹⁶⁵

¹⁶³ See UK 2013 Response, para. 7.9-7.11; see also Neumayr et al., cit. (fn. 155), pp. 189-190.

¹⁶⁴ See e.g. Dunne, “Courage and compromise”, (2015) ELRev 581, especially p. 585.

¹⁶⁵ See e.g., mutatis mutandis, Guttuso, “The enduring question of access to leniency materials”, cit. (fn. 61), pp. 15-16.